Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

MERWYN LEONARD BRYAN,
Petitioner

Versus

EAST STROUDSBURG UNIVERSITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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77 pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER OF NOT THIS PETITION FOR WRIT OF CERTIORARI OUGHT TO BE GRANTED WHERE THE DISTRICT COURT TURNED THE AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 USC SECTION 621 ET SEQ,, ON ITS HEAD BY HOLDING THAT A UNIVERSITY CAN AFFIRMATIVELY DENY EMPLOYMENT TO THE MOST QUALIFIED CANDIDATE FOR EMPLOYMENT SOLELY BECAUSE THE 54 YEAR OLD APPLICANT WAS RECOMMENDED FOR THE POSITION BY A FACULTY SEARCH COMMITTEE CITING HIS AGE AND EXPERIENCE AS POSITIVE FACTORS, AND THE UNIVERSITY EXPLICITLY REJECTED THE APPLICATION BECAUSE AGE WAS CITED AS A POSITIVE ASSET FOR THIS PROSPECTIVE EMPLOYEE AND THEN AWARDED THE JOB TO A FEMALE APPLICANT OUTSIDE OF THE PROTECTED CLASS?

PARTIES INVOLVED IN THE PROCEEDING

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TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW.....	i
PARTIES INVOLVED IN PROCEEDINGS....	ii
TABLES OF CITATIONS.....	iv
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	2
FEDERAL PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.....	12
ARGUMENT.....	13
CONCLUSION.....	21
ORDER OF U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 16, 1996 PER MANSMANN AND GREENBERG CJ AND HILLMAN.....	1a
ORDER AND OPINION OF UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED FEBRUARY 23, 1996 PER NEALON, J....	4a
ORDER AND OPINION OF UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF PENNSYLVANIA DATED NOVEMBER 9, 1994 PER NEALON, J.....	26a
ADEA.....	42a

TABLE OF AUTHORITIES

	PAGE
McDonnell Douglas vs. Green, 411 U.S. 792 (1973)	18, 24
O'Connor vs. Consolidated Caterer's Corp., ___ U.S. ____ (1996).....	16, 19, 22
St. Mary's Honor Center vs. Hicks, 509 U.S. 502 (1993)	23
Texas Dept. of Comm. Affairs vs. Burdine, 450 U.S. 248 (1980)	18

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MERWYN LEONARD BRYAN,
Petitioner

versus

EAST STROUDSBURG UNIVERSITY,
Respondent

The Petitioner, Merwyn Leonard Bryan, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered October 16, 1996 is recorded at 101 F 3d 691 (3rd Cir., 1996) and appears at page 1a of the Appendix herein.

The Orders and Opinions of the United States District Court for the Middle District of Pennsylvania, ___ F. Supp. ___ (M.D, Pa, 1996) and appears at page 4a and 26a of the appendix herein, and although both trial court opinions were rendered by Nealon, J., they are contradictory and reach opposite conclusions.

FEDERAL PROVISIONS INVOLVED

The Age Discrimination In Employment Act {A.D.E.A.}, 29 U.S.C. Section 621 et seq.

JURISDICTION

The final order of the U.S.Court of Appeals for the Third Circuit is dated October 16, 1996 and this petition for Writ

of Certiorari if filed timely within ninety (90) days thereof the jurisdiction of this Honorable Court rests upon 28 USC Section 1254(1) and Rule 10(c) of this Honorable Court.

STATEMENT OF THE CASE

a) Procedural History

Dr. Bryan filed this Age Discrimination in Employment Act [ADEA] claim after he was denied a position as a professor in the Geography Department at East Stroudsburg University [ESU] in early 1992 based upon his age ; to wit, 54 years old. In 1994, Defendant filed a motion for summary judgment, and Plaintiff filed a cross-motion for summary judgment. The district court initially issued an order in November of 1994 denying Defendant's motion for summary judgment with respect to Plaintiff's age discrimination claim and also denied Plaintiff's cross-motion for summary judgment. See, 4a herein. No additional discovery occurred after entry of the November 1994 order.

On November 9, 1995, the parties and their attorneys appeared before the district court to begin a jury trial on Plaintiff's

ADEA claim. Instead of selecting a jury, as scheduled, the trial judge permitted the Defendant to renew Defendant's previous motion for summary judgment even though NOT a single deposition had occurred and no new evidence had been discovered since the court's earlier order denying summary judgment on Plaintiff's ADEA claim.

On February 23, 1996, the district court reversed its earlier order and granted Defendant's renewed motion for summary judgment. See, 26a herein. On October 11, 1996, the United State Court of Appeals for the Third Circuit affirmed the granting of summary judgment in favor of the Defendant. Dr. Bryan now respectfully seeks review by this Honorable Court.

b) Statement of Facts

Merwyn Bryan, born in 1937, holds an A.B. in Geography from the University of Indiana at Bloomington, an M.Sc. from McGill University in Montreal, Canada, an M.B.A. in

Management for St. Joseph's University in Philadelphia, and a Ph.D. in Geography from the University of Michigan at Ann Arbor.

Plaintiff has published approximately 50 scholarly articles, 30 reviews of professional books, and authored one book. Plaintiff has previously taught regional courses in Africa while he was working as an Assistant Professor at Frostburg State University in Maryland from 1965 to 1968. Additionally, Plaintiff has taught at the Asian Institute of Technology.

Plaintiff applied for a position with the East Stroudsburg University [ESU], Department of Geography. On December 16, 1991, Plaintiff was interviewed by three members of the ESU faculty, and was the number one choice of the Search and Screen Committee of E.S.U.

On December 29, 1991 Dr. Baxevanis, a committee member, recommended Plaintiff to President Gilbert for the job of Associate

Professor at the upper rank of the salary scale, due to his:

> **"...age, experience with private industry, overall character and demeanor, years teaching, graduate from a recognized institution dedicated to geology/geomorphology, belonged to numerous professional organizations, has published in first-rate journals, and has remained professionally active through his career."** Baxevanis memo recommending Dr. Bryan for the position.

Dr. Baxevanis, then sent Plaintiff a letter to inform him of his recommendation by the department faculty Search And Screen Committee.

On June 16, 1992, Peter Bedrosian, ESU Provost, informed Plaintiff that the Search And Screen process was "flawed", and thus aborted. The perceived fatal flaw was Plaintiff's age, and the fact that the Faculty Search & Screen Committee considered Plaintiff's "age and experience" as assets. Plaintiff was no longer in consideration for the position of Associate Professor at ESU. In their depositions, Bedrosian and Gilbert

said they cancelled the department faculty Search And Screen after Plaintiff finished Number One explicitly because age was cited as a positive factor in the recommendation. Peter Bedrosian testified as follows:

> "Q: And at some point in time before action was taken, a decision was made to abort the search committee process, correct?
> A. A decision was made that the search committee's recommendation was in violation of the affirmative action law as I know it in this nation.
> Q: Affirmative action law?
> A. As I know it anyway, as I think about it.
> Q. What law do you think there is about affirmative action?
> A. That Mr. Bryan [Plaintiff] was recommended for the position, the main qualification for the--**the main reason for recommending him was his age. The primary reason was his age.**"

Instead, Monica Nyamwange, a person outside of the age protected class, was appointed to a full-time tenure track position of Assistant Professorship on June 2, 1992.

E.S.U. has attempted to justify its decision not to hire Dr. Bryan by claiming

it was compelled to hire a minority applicant. As set forth below, E.S.U.'s after-the-fact justification is unworthy credence. More importantly, the fact remains the E.S.U. admitted Plaintiff was the most qualified and E.S.U. did not hire Plaintiff due to his age. That violates the strictures of the A.D.E.A.

Monica Nyamwange, an African-born, Black female, admitted, under oath, that she was not qualified for either position offered by the Geography Department:

> "Q. My question is to the--let's talk of them in terms of two jobs, and I think they've been calling them--one of the jobs they've been calling the climatologist/meteorologist job.
> A. Um-hum.
> Q. Do you agree or disagree that to the extent that that job requires meteorology, **you're not qualified?**
> **A. I'm not.**
> Q. And the other job that we've been calling the geomorphology/cartography **you're not qualified?**
> **A. Yes.**
> Q. Yes, you're not qualified? Is that what you meant?
> A. Yes."

The E.S.U. Geography Department and the

Faculty Search Committee had disqualified Monica Nyamwange for lack of qualifications as early as 1989. Prior to her latest disqualification, Dr. Nyamwange had been interviewed by four members of the department, and the four members were unanimous that she was not qualified for further consideration.

The history of Dr. Bryan's efforts at securing employment at E.S.U. is as follows:

8/13/91: Plaintiff applied for employment with E.S.U.;

12/16/91: Plaintiff interviewed by 3 ESU faculty members;

2/5/92: Plaintiff informed by Baxevanis that he finished first in Search and Screen;

4/16/92: Date on grievance document prepared by Dr. Nyamwange to get the position for which Dr. Bryan was recommended;

4/27/92: Date Dr. Nyamwange grievance was filed;

5/19/92: E.S.U. informed Plaintiff that Search and Screen recommendation was under review;

6/2/92: Grievance resolved by letter from Gilbert to Dr. Nyamwange giving her the job Plaintiff was seeking;

6/4/92: Grievance settlement accepted by Dr. Nyamwange;

6/16/92: Bedrosian tells Plaintiff that Search and Screen has been aborted, and that he is no longer the number one candidate.

Significantly, the chairman of E.S.U.'s Geography Department, Dr. Baxevanis, explicitly testified that, if E.S.U. wanted to hire the most qualified minority, he recommended Dr. Shahalam Amin (late 40's - mid 50's), but if E.S.U. wanted the most qualified applicant, it was Plaintiff:

> "Q. Was race a factor, Doctor?
> A. No. Not to exclude her, but race is a factor because Leonard Bryan didn't get the job, because Kathy Scrieber didn't get the job, and if you want-- someone wants to introduce race into the picture, boy, I've got another file

here guys. In this file in the Shahalam M. Amin, and I mentioned this to the Provost. I said if you really want another minority person, this person is better than Monica, but not as good as the other two...
Q. And--let's see, was he also older?
A. Yes, I guess he was in his late 40's, early 50's."

In other words, the evidence which would have been presented to the jury was that E.S.U. not only disqualified Plaintiff because of his age, but also rejected a minority candidate who was also in the protected age class in order to give the job to a person under 40 who testified, under oath, that she was not qualified for the job!

As clearly observed by Dr. Baxevanis in his pre-litigation letters, the President was delaying Plaintiff's hiring due to his age: "The other individuals, **due to age and experience**, may not be offered the higher rank or salary." (emphasis added).

As clearly indicated by Peter

Bedrosian, Plaintiff's age was the fact which eliminated him from consideration and caused the search and screen to be aborted:

> "Q. What are you saying?
> **A. I'm saying that for--for the department to give as the first reason or any reason for finding this as a desirable candidate to say that his age made him a desirable candidate and should be selected because of his age.**
> **Q. You think that's discriminatory?**
> **A. And I think that's discriminatory.**
> **Q. And is that the sole basis upon which you aborted the selection committee process?**
> **A. Primarily."**

Based on the foregoing, the District Court originally concluded that genuine issues of material fact exist concerning Plaintiff's age claim, precluding summary judgment stating:

> "...a review of the record reveals several other disputed issues of material fact which could warrant denial of a motion for summary judgement. These include, inter alia, the exact composition of the search and screen committee, **whether the search and screen committee used impermissible criterion to make its selection, the motivation being the administration's aborting the search and screen process and the reason for the initial rejection of Dr. Nyamwange by the**

> **search and screen committee.** Both parties have submitted significant evidence on these and other issues. The resolution of these conflicts requires determination by a fact-finder, and thus, the motions for summary judgement must be denied."

Page 8 of Original Order, 11/9/94, at 40a herein.

Immediately before the jury trial was to commence, defense counsel made certain oral representations to the trial court and requested the opportunity to file a renewed motion for summary judgement. The trial court then permitted the parties to leave to re-file the motions for summary judgement which the court previously denied.

At the Pre-trial conference, Plaintiff's counsel pointed out that Provost Bedrosian admitted under oath that he aborted the selection process because Plaintiff was selected for his age and experience. That is exactly what Provost Bedrosian said. Despite the fact that the facts are in dispute and **despite Defendant's**

admission of age discrimination against Plaintiff, Defendant again sought to delay trial by renewing its motion for summary judgement.

Inexplicably, on the exact same record, **without a single new piece of evidence,** the District Court reversed its prior Order and Opinion concluding:

> "...that no genuine issues of material fact exists as to (1) the aborting of the search and screen process in February, 1992 for the reasons stated by Defendant; (2) the fact that applications for the position '1B-91-11' were no longer being solicited or received after the process was aborted; and (3) the fact that Plaintiff was not discriminated against because of his age either in the decision to abort the search and screen process or in the appointment of Nyamwange."

Upon these facts, Plaintiff appealed the order granting Defendant's renewed motion for summary judgement on Plaintiff's age claim. The U.S. Court of Appeals affirmed, without opinion. Plaintiff respectfully seeks review by this Honorable Court, and submits this brief in support of

his Petition for Writ of Certiorari which is now before this Honorable Court for disposition.

REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

Review by certiorari is appropriate in this case under Rule 10(a) of the Rules of the Supreme Court of the United States in that a United States Court of Appeals has entered a decision in conflict with the decision of the Supreme Court of the United States in the case of James O'Connor vs. Consolidated Coin Caterers Corporation, ___ U.S. ___ (April 1, 1996).

ARGUMENT

I. WHETHER OR NOT THIS PETITION FOR WRIT OF CERTIORARI OUGHT TO BE GRANTED WHERE THE DISTRICT COURT TURNED THE AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 USC SECTION 621 ET SEQ., ON ITS HEAD BY HOLDING THAT A UNIVERSITY CAN AFFIRMATIVELY DENY EMPLOYMENT TO THE MOST QUALIFIED CANDIDATE FOR

WAS RECOMMENDED FOR THE POSITION BY A FACULTY SEARCH COMMITTEE CITING HIS "AGE AND EXPERIENCE" AS POSITIVE FACTORS, AND THE UNIVERSITY EXPLICITLY REJECTED THE APPLICATION BECAUSE AGE WAS CITED AS A POSITIVE ASSET FOR THIS PROSPECTIVE EMPLOYEE AND THEN THE UNIVERSITY AWARDED THE JOB TO A FEMALE APPLICANT OUTSIDE OF THE PROTECTED CLASS?

1. The Age Discrimination in Employment Act [ADEA] prohibits an employee from failing or refusing to hire any individual because of the individuals age. 29 USC Section 623(a)(1). The ADEA applies to employees over age 40. 29 USC Section 631(a). E.S.U. refused to hire Dr. Bryan based upon his age, and the university officials admitted that the search committee process was "aborted" because Plaintiff's age was cited by the Faculty Search Committee as a positive factor in recommending the Plaintiff for the job. Hence, Plaintiff

Plaintiff for the job. Hence, Plaintiff presented direct evidence of age discrimination, and the trial court erred as a matter of law by failing to recognize that aborting the Faculty Search Committee's and its recommendation solely because his advance age was cited as a positive factor constituted impermissible age discrimination prohibited by ADEA. Given this direct evidence of age discrimination, Plaintiff was entitled to present this case to the jury.

The three-stage shifting the burden of proof was originally developed for Title VII cases, McDonnell Douglas v, Green, 411 US 792 (1973) and Texas Dept. of Comm. Affairs v. Burdine, 450 US 248 and adapted for use in ADEA cases.

Plaintiff also met the four elements of McDonnell Douglas vs. Green, supra.Plaintiff was in the protected class, was qualified for the position, was not given the job, and

the protected class. See, O'Connor vs. Consolidated Caterer's Corp., supra. Plaintiff was not required to proceed solely upon that test, however, because the administration officials of E.S.U. testified that Plaintiff was disqualified because it disagreed with the Faculty Search Committee's recommendation solely because advanced age was considered a positive asset for a professor.

2. The Employer admitted eliminating Plaintiff from consideration for employment because advanced age was considered in ranking him first among candidates for the position.

A. E.S.U. originally selected Dr. Bryan as the most qualified person for the position.

Plaintiff applied for a position with the East Stroudsburg University Department of Geography. On December 16, 1991, Plaintiff was interviewed by three members

Plaintiff was interviewed by three members of the ESU faculty, and was the number one choice of the Search And Screen Committee. On December 29, 1991, Dr. Baxevanis, a committee member, recommended Plaintiff to President Gilbert for the job of Associate Professor at the upper rank of the salary scale, due to his:

> "...age, experience with private industry, overall character and demeanor, years teaching, graduate from a recognized institution dedicated to geology/geomorphology, belonged to numerous professional organizations, has published in first-rate journals, and has remained professionally active throughout his career." Baxevanis memorandum recommending Plaintiff

On February 5, 1992 E.S.U. sent Dr. Bryan letter to inform him that the Geography departments Search and Screen Committee recommended Dr. Bryan for the position.

B. ESU admitted that it did not hire Dr. Bryan because his advanced age was considered as an asset in the selection

Peter Bedrosian informed Dr. Bryan the Search and Screen process was "flawed" and thus aborted. E.S.U. then eliminated Dr. Bryan from consideration for the position of Associate Professor, and gave the job to the young Dr. Nyamwange.

E.S.U. Provost explained why E.S.U. cancelled the Search and Screen process after Dr. Bryan had finished Number One:

> "Q. And at some point in time before action was taken, a decision was made to abort the search committee process correct?
> A. A decision was made that the search committee's recommendation was in violation of affirmative action law as I know it in this matter.
> Q. Affirmative action law?
> A. As I know it anyways, as I think about it.
> Q. What law do you think there is about affirmative action?
> A. That Mr. Bryan was recommended for the position, the main qualification for the -- the main reason for recommending him was his age. The primary reason was his age."
>
> ***
>
> "A. I'm saying that for--for the department to give as **the first reason or any reason for finding this as a desirable candidate to say that his age**

or any reason for finding this as a desirable candidate to say that his age made him a desirable candidate and should be selected because of his age.
Q. You think that's discriminatory?
A. And I think that's discriminatory.
Q. And is that the sole basis upon which you aborted the selection committee process?
A. Primarily."

The record is clear, E.S.U. admitted it did not hire Petitioner because age was considered a positive asset in the selection process, and that factor primarily caused Provost Bedrosian to abort the Faculty Search Committee process.That is exactly the type of evidence which indicates a violation of ADEA. The Faculty Search Committee wanted Dr. Bryan because of his advance age and experience. The administration at E.S.U. did not want the "old man", and rejected him "primarily" because his advance age was a factor in his favorable recommendation. Compare, O'Connor vs. Consolidated Caterer's Corp., supra.

3. The district court turned upside-down the

claim where employer's search and screen committee recommended Petitioner as the number one candidate and then admitted eliminating him form consideration because age was considered as a positive asset.

An ADEA Plaintiff must demonstrate that age actually played a role in the employer's decision process and that age was a determinative factor on the outcome of the process. St. Mary's Honor Center vs. Hicks, 509 U.S. 502 (1993). As set forth above, Plaintiff was the most qualified applicant but was rejected via "an aborted screening process" due to positive consideration of Plaintiff's advanced age by the Faculty Search Committee. Plaintiff thus proved that, **"but for"** his age, Plaintiff would have been hired.

Defendant admitted blatant age discrimination. In simple terms, the administration explicitly determined that the Faculty Search Committee's citing

the Faculty Search Committee's citing advanced age as a "positive factor" disqualified Plaintiff. That is exactly the type of age-related decision an employer cannot make concerning an employee in the protected class under the ADEA. Furthermore, Defendant proceeded to hire someone outside the protected class. After the fact, Defendant is attempting to justify Plaintiff's rejection based upon age. Hence, the Plaintiff met the classic four-prong test under McDonnell Douglas vs. Green, supra.

The district court reasoned that Plaintiff sought favorable treatment due to his age. The District Court is absolutely wrong. Plaintiff never sought favorable treatment based upon age. Plaintiff, the most qualified candidate for the job, vociferously complains about his elimination from the search process because the interviewers considered his age and

administration expressly aborted the faculty search committee. It was the logic of Provost Bedrosian that violates the ADEA, namely, the Faculty Search Committee viewed advanced age as a positive assets, and recommended the applicant in the protected class, but the university was not going to hire an older candidate who was being recommended because of his advance age and experience.

The simple reality is that during the evaluation process, Defendant mentioned age as a favorable asset, i.e., age carries more wisdom and experience not found in younger candidate, and is an asset for a professor. The district court then reasoned that

> "...applicant is in the protected group who are over age 40, but younger than Plaintiff could conceivably complaint that they were being discriminated against by a decision to hire a candidate merely because he was in the upper age bracket of the class."
> 23a-24a

The district court's reasoning is fatally

The district court's reasoning is fatally flawed, and turns the A.D.E.A. statutory scheme on its head. If an applicant--under age 40--sues because an applicant age 55 received a job due to "age and experience", it is clear that applicant--under age 40--did not received the job due to inferior qualifications. In other words, where age is viewed as a favorable factor in the decision and a person outside of the protected class does not get the job, that person does not have a claim under ADEA. Rather, the employer could defend simply by demonstrating that employer hired the most qualified person, and the person outside of the protected class had no standing to sue.

Following the District Court's logic, the following scenario could occur. An employer reviewing candidates for a college teaching position for a Chicano Studies Department may explain that the number one candidate was selected, in part, because she

Such an employer obviously viewed the leading candidate's ethnicity as a positive factor--giving her added insight to and interest in the topics she would be teaching. Following the district court's logic, the Hispanic candidate must be eliminated because the employer considered her ethnicity, and under Title VII of the Civil Rights Act of 1964 as amended, that would be an impermissible factor. This leading Hispanic candidate, like Plaintiff at bar, would not be looking for an advantage, but merely a benefit in the application process from her background and experience.

If you carried the District Court's logic to its end, the fact of age and experience must always disqualify the senior, more experience applicant. Indeed, employers would be permitted to reject the most qualified candidates (i.e., the Hispanic in the example above, or Plaintiff

Hispanic in the example above, or Plaintiff in this case), based upon an employer's consideration of what could, but OBVIOUSLY CLEARLY WAS NOT, an impermissible factor in that particular hiring decision. That is what occurred in this case.

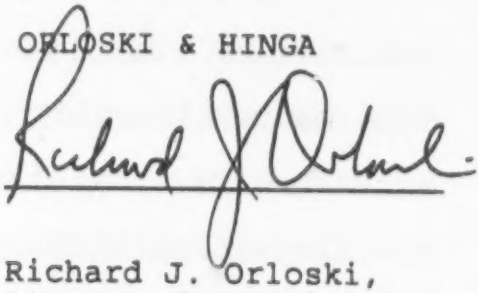
B. The district court's reasoning and holding open the door for unscrupulous employers to avoid hiring the most qualified applicants based upon their disability, race, religion, gender, age, or other "impermissible factors" under federal law. To avoid hiring a person who is protected under various federal laws and statutes, unscrupulous employers need only state that employer's search and screen committee recommended Petitioner as the number one candidate and then admitted eliminating him from consideration because disability, race, religion, gender or age was considered as a positive asset, and might subject them to a person outside of the protected class to

In the case at bar, the Faculty Search Committee viewed the impermissible factor -- age-- as a positive factor. Then, the applicant was rejected by the university administration because the recommendation by the faculty saw advanced age as a plus for a professor. Obviously, such a holding contravenes the intent and purpose of the ADEA protecting older employees who are too often the victims of invidious discrimination. Hence, the order affirming summary judgment in favor of E.S.U. ought to be Reviewed and Reversed, and the matter remanded for a jury trial.

CONCLUSION

For the foregoing reasons, Petitioner Dr. Merwyn Leonard Bryan respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari

ORLOSKI & HINGA



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7160

MERWYN LEONARD BRYAN,

Appellant

v.

EAST STROUDSBURG UNIVERSITY

On Appeal from the United States
District Court for the Middle
District of Pennsylvania
(D.C. Civ. No. 93-000983)
District Judge:
Honorable William J. Nealon

Argued October 11, 1996

BEFORE: MANSMANN and GREENBERG, Circuit Judges, and HILLMAN, District Judge*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

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*Honorable Douglas W. Hillman, Senior Judge of the United States District Court for the Western District of Michigan, sitting by designation.

ADJUDGED and ORDERED that the order of the district court entered on February 23, 1996, be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT

_____

Circuit Judge

ATTEST:

P. Douglas Sisk, Clerk

DATED: October 16, 1996

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MERWYN LEONARD BRYAN, Ph.D.,
Plaintiff

v. CIVIL NO. 3:CV-93-983

EAST STROUDSBURG UNIVERSITY,
Defendant

NOW, this 23rd day of February, 1996, consistent with the Memorandum of this date, IT IS HEREBY ORDERED THAT:

(1) Defendant's renewed motion for summary judgment (Doc. 52) with regard to Count Two of the complaint, age discrimination, is GRANTED.

(2) Plaintiff's renewed cross-motion for summary judgment (Doc. 57) with regard to Count Two of the complaint, age discrimination, is DENIED.

(3) The Clerk is directed to close this case.

_____
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MERWYN LEONARD BRYAN, Ph.D.,
Plaintiff

v. CIVIL NO. 3:CV-93-983

EAST STROUDSBURG UNIVERSITY,
Defendant

MEMORANDUM AND ORDER

On April 23, 1993, plaintiff Merwyn Leonard Bryan, Ph.D., filed this age and gender discrimination complaint in the United States District Court for the Eastern District of Pennsylvania. Named as defendant in this action is East Stroudsburg University. On June 30, 1993, the case was transferred to the Middle District of Pennsylvania. One June 24, 1994, a motion for summary judgment pursuant to Fed.R.Civ.P. 56 was filed by the defendant. A supporting brief and documents were also filed. One July 15, 1994, plaintiff filed a cross-motion for summary judgment and thereafter supporting documents. Plaintiff

also filed a brief in opposition to defendant's motion for summary judgment. Defendant filed a reply brief and also a brief in opposition to plaintiff's cross-motion.

On November 9, 1994, a Memorandum and Order was issued by this court granting the defendant's motion for summary judgment with respect to the gender discrimination count and denying the motion with respect to the age discrimination count. Further, the court denied plaintiff's cross-motion for summary judgment. On November, 9, 1995, a pre-trial conference was conducted wherein plaintiff's age discrimination claim was discussed. As a result of this discussion, the parties were given the opportunity to resubmit motions for summary judgment addressing the age discrimination claim.[1]

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[1] The court's decision in it's Memorandum and Order dated November 9, 1994, granting defendant's motion for summary judgment with regard to the gender

A renewed motion for summary judgment was filed by the defendant on November 17, 1995. A supporting brief and documents have also been filed. On December 13, 1995, plaintiff filed a renewed cross-motion for summary judgment and a brief in opposition to Defendant's renewed summary judgment motion. Defendant filed a brief in opposition to plaintiff's cross-motion on January 5, 1996. Both motions are ripe for disposition. For the reasons that follow, the court will deny the plaintiff's motion, and grant the defendant's motion.

JURISDICTION

The court has jurisdiction over this matter pursuant to Title VII of the Civil Rights Act of 1964 as amended in 1991, 42 U.S.C. Section 2000(e) et seq., particularly Section 2000(e) - 5(f) and the Age Discrimination in Employment Act (ADEA), 29

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discrimination count in the complaint, stands unchanged.

U.S.C. Section 621 et seq. Additionally, federal jurisdiction is based on 28 U.S.C. Section 1332.

FACTS

The East Stroudsburg University (ESU) Geography Department had five full-time permanent positions which were occupied in the early part of 1990 by four males and one female. Due to retirement, three of these positions became vacant between May and September of 1990. Betty Partington was subsequently hired on a temporary basis and searches were conducted for the two vacant full-time positions but were unsuccessful in that the searches were either cancelled or offers were declined by the applicants. Thereafter, Partington and Dr. Monica Nyamwange (Nyamwange) were hired for full-time temporary positions in the Geography Department for the 1991-1992 academic year. Nyamwange's teaching was evaluated by seven professors, six of whom made favorable

findings but one, Dr. Baxevanis (Baxevanis), found that she did not meet acceptable teaching standards.

In July of 1991, ESU engaged in another search to fill two full-time permanent positions in the Geography Department. The positions were advertised as "1B-91-11", a geography, geology, cartography position and "1B-91-12", a geography, meteorology, climatology position. The search was to be conducted by a search committee. In this instance, the committee consisted of only one individual, Baxevanis, who was an ESU professor in the Geography Department. While a search committee would normally consist of three persons, there were only two in the department and one, Chairperson Ian Ackroyd-Kelly, was on sabbatical in New Zealand. Further, as Chairperson, he was precluded under the Collective Bargaining Agreement from serving but was expected to submit a separate recommendation.

submit a separate recommendation. Plaintiff, a 54 year old white male with a Ph.D. in Geography, applied for position "1B-91-11".[2] Nyamwange, a 32 year old black female also with a Ph.D. in Geography, applied for both positions. While plaintiff was recommended by Baxevanis on December 29, 1991, as the primary candidate for position "1B-91-11", Nyamwange was rejected by him for both positions citing, for example, her failure to follow appropriate procedures in student evaluations.[3] In recommending plaintiff, Baxevanis stated, inter alia, "Bryan is ranked first because of his age ...". In February of 1992, the administration of ESU made the decision to abort the search and screen process with

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[2]Plaintiff was not a member of the ESU faculty at the time.

[3]However, on February 11, 1992, Chairman Ackroyd-Kelly submitted a favorable evaluation of Nyamwange's teaching performance.

positions for the stated reasons of improper composition of the committee; the use by Baxevanis of an incomplete recommendation format; missing forms and documentation, including required Affirmative Action forms; and reliance by Baxevanis on an impermissible factor (plaintiff's age) in evaluating a candidate.

Because of rumors and other unsubstantiated allegations concerning efforts of members of the faculty to discriminate against Nyamwange in her efforts to seek a tenured appointment, University President James Gilbert, on April 10, 1992, requested the State System of Higher Education to appoint a state official to investigate the charges of discriminatory conduct toward Nyamwange. Separately, on April 16, 1992, Nyamwange filed a grievance through the faculty union complaining of the alleged racist treatment of her by Baxevanis and Robert Flower, director of the computer

center. Part of the request for relief in Nyamwange's grievance included her appointment to a full-time continuing teaching position at ESU.

Byron Wiley, the State Systems' Director of Social Equity, conducted the investigation and issued a report dated May 20, 1992, finding that Nyamwange had been treated unfairly in many respects and recommended that she be appointed as a full-time faculty member to end the "appalling" treatment of her. David Felker, Assistant to the President, reviewed the grievance, the Wiley Report, and other documentation, including instances of alleged negative conduct toward Nyamwange by Baxevanis, and recommended to President Gilbert that Nyamwange's grievance be resolved by providing her with an Assistant Professorship position in the Geography Department effective August 22, 1992. This position did not require the same

educational background as those described in the July, 1991, search for which plaintiff had applied but involved teaching subjects in the department for which she was qualified. President Gilbert offered the appointment to Nyamwange, she accepted, withdrew her grievance, and assumed the position on August 22, 1992.

Plaintiff contends that he was denied the appointment in the Geography Department because of his age while the defendant argues that the sole reason for appointing Nyamwange was to resolve what appeared to be a meritorious grievance and to correct past improper treatment of her.[4] Furthermore, that the investigations, the grievance, and the appointment all occurred after the search and screen process had been aborted for failure to follow appropriate practice

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[4]A 1988 University Affirmative Action Report found that racial minorities were under-represented in the Geography Department.

and criteria and, therefore, there was no connection between the two.

SUMMARY JUDGMENT STANDARD

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the United States Supreme Court outlined the proper interpretation of Rule 56(c):

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment "as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case to which she has the burden of proof.

Celotex, 477 at 322-23. "Any credible

> "as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case to which she has the burden of proof.

Celotex, 477 at 322-23. "Any credible evidence contrary to the moving party's version of events will defeat the summary judgment motion." Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 908 (3d Cir. 1984). In light of this standard, the court will now review the pending motions.

ANALYSIS

Plaintiff's claim of age discrimination is predicated on The Age Discrimination in Employment Act (ADEA) found at 29 U.S.C. Section 621, et seq. This statute, and in particular, 20 U.S.C. Section 623(a)(1) provides that it shall be unlawful for any employer "...to fail or refuse to hire...any individual...because of such individual's age." 29 U.S.C Section 623(a)(1). The ADEA further identifies the class of individuals

act, clearly falls within the protected class.

In attempting to establish a prima facie case of discrimination, plaintiff carries the initial burden and is required to demonstrate, by a preponderance of the evidence, the four criteria set forth in the case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In particular, plaintiff must show: (1) that he belonged to a protected class or group; (2) that he applied and was qualified for a position for which the employer was seeking applicants; (3) that he was rejected despite his qualifications; and (4) that following his rejection, his employer continued to accept applicants possessing plaintiff's qualifications for the same position. McDonnell Douglas, 411 U.S. at 802. If plaintiff establishes his prima facie case, the burden then shifts to the defendant to demonstrate that there exists "...some

qualifications for the same position. McDonnell Douglas, 411 U.S. at 802. If plaintiff establishes his prima facie case, the burden then shifts to the defendant to demonstrate that there exists "...some legitimate, nondiscriminatory reason for the employee's rejection". Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980) citing McDonnell Douglas, 411 U.S. at 802.

Plaintiff must demonstrate that "but for" his age, ESU would not have denied him a professor position in the Geography Department. Seman v. Coplay Cement Co., 26 F.3d 428 (3rd Cir. 1994). See also Billet v. CIGNA Corp., 940 F.2d 812 (3d Cir. 1991). The issue is not whether ESU's decision was fair, but whether the decision was based upon plaintiff's age and, thus, in violation of the ADEA. Hawkins v. Ceco Corp., 883 F.2d 977 (11th Cir. 1989), cert. denied 495 U.S. 935 (1990); Dodge v. Susquehanna

first two criteria outlined in McDonnell Douglas. Plaintiff belonged to the protected class and he applied and was qualified for a job for which ESU was seeking applicants. As to the remaining criteria, plaintiff contends that he was rejected for a position that remained open; that ESU continued to see applicants from persons of plaintiff's qualifications; and that Nyamwange, a younger person, was ultimately hired for the position.[5]

Defendant disputes the assertion that plaintiff was rejected for the position arguing that the search process was aborted for reasons other than plaintiff's qualifications and that applicants were no longer being sought at the time Nyamwange was appointed. The reasons advanced for

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[5]The position referred to by Plaintiff is "1B-91-11", the geography/geology/cartography position. This is the only position for which plaintiff and Nyamwange both applied.

for reasons other than plaintiff's qualifications and that applicants were no longer being sought at the time Nyamwange was appointed. The reasons advanced for aborting the process are fully supported in the record. The decision was made before the grievance was filed by Nyamwange and prior to the investigations being conducted by persons outside the University.[6] There is simply no credible evidence that it was made discriminately in order to reject plaintiff because of his age.

Even accepting the argument that the cancelling of the search constituted a

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[6]The reports relied upon were as follows: (1) the Wiley Report, investigated and prepared by Byron Wiley, the State Systems' Director of Social Equity, following the filing of the grievance and (2) the Mulle Report, prepared by Robert Mulle, an investigator assigned by the State System to investigate an earlier matter involving Nyamwange. Felker also relied upon his own personal information and other ESU documentation.

case and the burden does not shift to the University to articulate some legitimate, nondiscriminatory reason for failing to hire him. Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). However, assuming that evidence exists warranting a shifting of the burden to the University, there is compelling evidence demonstrating that the failure to hire plaintiff was for reasons totally unrelated to his age.

Plaintiff's evidence and arguments, on the other hand, were largely directed to the interpretation of the Collective Bargaining Contract, dissension in the Geography Department, whether Baxevanis is a racist, the comparative qualifications of plaintiff and Nyamwange, etc., but much of it misses the mark. Whether the defendant's conduct violated the procedural requirements of the Collective Bargaining Agreement is of no concern unless it is probative of a contention that the violation was part of

the mark. Whether the defendant's conduct violated the procedural requirements of the Collective Bargaining Agreement is of no concern unless it is probative of a contention that the violation was part of the decision to reject plaintiff because of his age. If the appointment of Nyamwange violated the Collective Bargaining Agreement, this also has no relevance unless it was linked to an effort to reject plaintiff because of his age. For the purposes of this action, defendant could appoint any candidate, even an inferior one, so long as there was no age discrimination involved in the selection. Consequently, notwithstanding the volume of this other evidence, the factual background must be developed and analyzed only to the extent that the age issue is implicated.

Plaintiff's responses to defendant's Renewed Statement of Material Facts As To Which There Is No Genuine Issue In Dispute

were, in large measure, conclusory and, in some instances, misleading and inaccurate. The reference to his age relied on in plaintiff's responsive affidavit was to Bedrosian's statement that the impermissible use of plaintiff's age by Baxevanis as a reason to hire him was the primary factor that motivated the decision to abort the process. The recognition by the University that an effort to recommend plaintiff for an appointment because of his age was an unacceptable reason cannot be twisted into an inference that he was discriminated against because of his age. Indeed, the only source for the mention of age in the extensive documentation, including depositions, placed into the record is in Baxevanis' letter of December 29, 1992, recommending plaintiff for appointment, which was followed by the testimony of President Gilbert and Provost Bedrosian that they believed that Baxevanis' reliance on

Baxevanis' letter of December 29, 1992, recommending plaintiff for appointment, which was followed by the testimony of President Gilbert and Provost Bedrosian that they believed that Baxevanis' reliance on age as the primary factor in his favorable recommendation was impermissible under affirmative action principles. It was Baxevanis who introduced age into the picture and the response by the Administrator that one should not receive favorable treatment because of his age was understandable. The Age Discrimination in Employment Act was designed to prevent employers from discriminating against an applicant who is at least 40 years of age and not to give those in that group advantage in the selection process over those under 40 years of age. In fact, applicants in the protected group who are over age 40 but younger that plaintiff could conceivably complain that they were being

plaintiff's age was a determinative factor in his failure to obtain the position for which he applied. Similarly, there is no credible evidence that would challenge defendant's representations that Nyamwange was appointed to a position in the Geography Department to settle a grievance to correct perceived unfair treatment of her by certain members of the faculty. Again, insofar as this lawsuit is concerned, the University is free to appoint any person to a faculty position so long as it was not done for an impermissible reason such as age discrimination.

Summing up, therefore, the court concludes that no genuine issue of material fact exists as to (1) the aborting of the search and screen process in February, 1992, for the reasons stated by defendant; (2) the fact that applications for the position "1B-91-11" were no longer being solicited or received after the process was aborted; and

search and screen process in February, 1992, for the reasons stated by defendant; (2) the fact that applications for the position "1B-91-11" were no longer being solicited or received after the process was aborted; and (3) the fact that plaintiff was not discriminated against because of his age either in the decision to abort the search and screen process or in the appointment of Nyamwange.

CONCLUSION

For the reasons cited above, the court will grant defendant's renewed motion for summary judgment and deny plaintiff's renewed cross-motion for summary judgment with regard to the age discrimination claim.

An appropriate Order is attached.

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United States District Judge

Date: February 23, 1996

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MERWYN LEONARD BRYAN, Ph.D.,
Plaintiff

v. CIVIL NO. 3:CV-93-983

EAST STROUDSBURG UNIVERSITY,
Defendant

AND NOW, this 9th day of November, 1994, consistent with the Memorandum of this date, IT IS HEREBY ORDERED THAT:

(1) Defendant's motion for summary judgment with regard to Count One of the complaint, gender discrimination, is GRANTED.

(2) Defendant's motion for summary judgment with regard to Count Two of the complaint, age discrimination, is DENIED.

(3) Plaintiff's motion for summary judgment is DENIED.

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United States District Judge

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MERWYN LEONARD BRYAN, Ph.D.
Plaintiff

v. CIVIL NO. 3:CV-93-983

EAST STROUDSBURG UNIVERSITY
Defendant

MEMORANDUM AND ORDER

The plaintiff, Merwyn Leonard Bryan, Ph.D., filed this age and gender discrimination complaint on April 23, 1993, in the United States District Court for the Eastern District of Pennsylvania naming East Stroudsburg University as the defendant. The case was duly transferred to the Middle District on June 30, 1993. Discovery in this matter having been completed, East Stroudsburg University on June 24, 1994, filed a motion for summary judgment pursuant to Fed.R.Civ.P. 56 with supporting brief and documents filed on June 29, 1994. Plaintiff filed a cross-motion for summary judgment on

July 15, 1994, and a supporting brief on July 25, 1994 together with a brief in opposition to defendant's motion for summary judgment. Defendant filed a reply brief in support of the motion for summary judgment on July 29, 1994 along with a brief in opposition to plaintiff's cross-motion for summary judgment. The motions are ripe for disposition. For the reasons that follow, the court will deny plaintiff's motion and grant, in part, and deny, in part, the defendant's motion.

JURISDICTION

The court has jurisdiction over this matter pursuant to Title VII of the Civil Rights Act of 1964 as amended in 1991, 42 U.S.C. Section 2000(e) et. seq., particularly Section 2000(e) - 2(a) and Section 2000(e) - 5(f) and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 621 et seq. Additionally,

federal jurisdiction is based on 28 U.S.C. Section 1332.

FACTS

During the period of May 1990 to September 1990, the East Stroudsburg University (ESU) Geography Department lost three of its five faculty members to retirement. Searches were conducted to fill the full-time positions, without success. As a result, two temporary faculty members, Betty Partington and Dr. Monica Nyamwange (Nyamwange) were hired to help cover classes left vacant by these retirements.[7]

In July 1991, ESU authorized another search for full-time permanent positions in the Geography Department. The two positions

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[7]From the record, it appears Betty Partington was hired "on a temporary basis" for 1990-91. Both Betty Partington and Dr. Monica Nyamwange were hired to "full-time, temporary position(s) in the Geography Department for the 1991-92 academic year."

were 1B-91-11[8] (advertised as a geography, geology, cartography position) and 1B-91-12 (advertised as a geography, meteorology, climatology position). The search was conducted by a search committee, the composition of which is the subject of contention between the parties. The plaintiff, a white male who was 53 years old[9], applied for position 1B-91-11 in August of 1991. He was not a member of the ESU faculty at the time of his application. Nyamwange, a black female who was 32 years of age[10], applied for both positions in the fall of 1991. Bryan was recommended by the search and screen committee as the top candidate for position 1B-91-11, the

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[8]These codes are assigned by ESU merely to denote different positions within the university.

[9]Plaintiff's date of birth is September 25, 1937.

[10]Dr. Nyamwange's date of birth is September 10, 1959.

geography/geology/cartography post, and was informed of this recommendation. Nyamwange was rejected by the committee for both positions. The administration of ESU decided to abort the search and screen process with respect to both positions in February of 1992 and did not hire any of the candidates at that time.

In April 1992, while still employed by ESU in a temporary capacity, Nyamwange filed a grievance through the faculty union complaining of her treatment by various members of the ESU faculty and staff. The primary thrust of the complaint centered around allegedly racist treatment by Dr. John Baxevanis, a professor in ESU geology department and a member of the aborted search committee. The grievance requested as a portion of the relief that Nyamwange be appointed to a full-time continuing position at the University. David Felker, Assistant to the President as ESU, was in charge of

reviewing grievances and recommending resolution of grievances on behalf of the University. He conducted an investigation of the matter and recommended that Nyamwange's grievance be resolved by providing her a full-time, permanent Assistant Professor post in the Geography Department effective August 22, 1992. Nyamwange assumed the Assistant Professor position at that time and has continued in that capacity.

ANALYSIS

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the United States Supreme Court outlined the proper interpretation of Rule 56(c):

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails

> Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment "as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case to which she has the burden of proof.

Celotex, 477 at 322-23. "Any credible evidence contrary to the moving party's version of events will defeat the summary judgment motion." Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 908 (3rd Cir. 1984). In light of that standard, the court will now review both the plaintiff's and defendant's motions.

Count I - Gender Discrimination

2, which reads, in pertinent part" "(a) It shall be an unlawful employment practice for an employer-- (1) to fail or refuse to hire...any individual,...because of that individual's race, color, religion, sex or national origin." 42 U.S.C. 2000(e)-2 (emphasis added).

As is correctly pointed out in defendant's brief in support of its motion for summary judgment, the burdens of the parties in a case brought pursuant to Title VII are as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employees rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1980). 'In order to establish

> nondiscriminatory reason for the employees rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1980). In order to establish a prima facie showing of discrimination in a Title VII case, a plaintiff must show (i) that he belongs to a protected class or group; "(ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications." McDonnell Douglas Corp. v. Green, 792 U.S. 792, 802 (1973). However, as the plaintiff in the instant case is a member of the majority or

suspicion that the defendant is that unusual employer who discriminates against the majority." Notari v. Denver Water Dept., 971 F.2d 585 (10th Cir. 1992)(quoting Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012 (D.C.Cir. 1981)).

A review of the record shows that the plaintiff in the instant case has failed to present any credible evidence indicating that ESU is the "unusual employer who discriminates against the majority." Indeed, a review of the prior composition of the ESU Geology Department as presented in the defendant's briefs might lead one to the opposite conclusion. Thus, the plaintiff "has failed to make a sufficient showing on an essential element of (his) case to which (he) has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). For this reason, the defendant's motion for summary judgment will be granted with respect to Count One of the plaintiff's

opposite conclusion. Thus, the plaintiff "has failed to make a sufficient showing on an essential element of (his) case to which (he) has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). For this reason, the defendant's motion for summary judgment will be granted with respect to Count One of the plaintiff's complaint.

Count II - Age Discrimination

Count Two of the complaint is brought pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 621, et seq. The plaintiff alleges the hiring practices employed by ESU were in violation of the 29 U.S.C. Section 623, which reads, in pertinent part: "It shall be unlawful for an employer--(1) to fail or refuse to hire...any individual...because of such individual's age." The class protected by the ADEA is composed of those persons between forty (40) and seventy (70) years of

case to establish a prima facie case of discrimination. He need not make the additional showing, viz., that ESU was the "unusual employer who discriminates against the majority", required in his gender discrimination claim. As noted, in order to establish a prima facie showing of discrimination in a Title VII case, a plaintiff must show (i) that he belongs to a protected class or group; "(ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications." McDonnell Douglas Corp. v. Green, 792 U.S. 792, 802 (1973). Bryan is a member of the protected class. There is no dispute that the plaintiff applied and was qualified for position 1B-91-11, the

rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications." McDonnell Douglas Corp. v. Green, 792 U.S. 792, 802 (1973). Bryan is a member of the protected class. There is no dispute that the plaintiff applied and was qualified for position 1B-91-11, the geography/geology/cartography post at ESU. Despite his academic qualifications, he was rejected. There exists a dispute of material fact whether the plaintiff has met the final criterion of McDonnell Douglas, vis., whether Dr. Nyamwange's position is indeed the same position for which the plaintiff applied. Since credible evidence has been submitted by both parties as to this point, it is for the factfinder to determine whether this last hurdle has been cleared. Therefore, the summary judgment motions of both the plaintiff and the defendant must be denied.

screen committee used impermissible criterion to make its selection, the motivation behind the administration's aborting the search and screen process and the reason for the initial rejection of Dr. Nyamwange by the search and screen committee. Both parties have submitted significant evidence on these and other issues. The resolution of these conflicts requires determination by a factfinder and, thus, the motions for summary judgment must be denied.

CONCLUSION

For reasons cited above, the court will grant defendant's motion for summary judgment with regard to Count One, gender discrimination, and deny the motion with regard to Count Two, age discrimination. The court will deny plaintiff's motion for summary judgment.

An appropriate Order is attached.

grant defendant's motion for summary judgment with regard to Count One, gender discrimination, and deny the motion with regard to Count Two, age discrimination. The court will deny plaintiff's motion for summary judgment.

An appropriate Order is attached.

United States District Judge

Date: November 9, 1994

A.D.E.A.

"It shall be unlawful for an employer--(1) to fail or refuse to hire...any individual...because of such individiual's age."

29 U.S.C. Section 263